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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1683

FIRST BEVERAGES, INC. OF LAS VEGAS, et al., Petitioners,

vs.

ROYAL CROWN COLA CO., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FIRST BEVERAGES, INC. OF LAS VEGAS, et al., Petitioners,

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ROYAL CROWN COLA CO., Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, First Beverages, Inc. of Las Vegas, Norton Packaging, Inc. of Arizona, Will Norton, H & M Sales Co., Inc., and Mae-Con Enterprises, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 30, 1980. Petitioners, all the plaintiffs and the counter-

defendant in two cases which were consolidated for all purposes below, are listed together in one caption pursuant to Rule 23(5).

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The District Court wrote no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1980, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), "impliedly" held, as the Court of Appeals

below ruled, that the vertical territorial restraints imposed by the soft drink companies on their dealers which totally eliminate intrabrand competition must be tested for legality under Section 1 of the Sherman Act under the rule of reason only, or held, as the Seventh and Tenth Circuits and the Federal Trade Commission decided, that particular applications of vertical restrictions may, based upon demonstrable economic effect, justify per se prohibition under Northern Pac. R. Co. v. United States, 356 U.S. 1 (1958)?

2. Where plaintiffs in a private antitrust suit carried their burden of proving that a defendant's vertical territorial restraint was per se unreasonable under the passage of title test set forth in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and during an appeal from the trial court's refusal to instruct the jury that the restraint was per se unreasonable

the Supreme Court of the United States changed the law in Sylvania by overruling Schwinn's passage of title test and imposed a changed burden of proof requiring that plaintiffs prove, based upon demonstrable economic effect, that the restraint was per se unreasonable under Sylvania and Northern Pac., does the rule of United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103, 109, and its progeny require that such intervening change in the law must be applied in pending litigation and that petitioners, who assert that Royal Crown's restraint is, based upon demonstrable economic effect, per se unreasonable under Sylvania and Northern Pac., be afforded an opportunity to carry this changed and retroactively imposed burden of proof?

3. Did Sylvania set forth some of the relevant factors to be considered by future juries in determining the reasonableness or unreasonableness of vertical territorial

restraints under the rule of reason, as held by the Fifth Circuit in Dougherty v. Continental Oil Co., 579 F.2d 954, 960 (5th Cir. 1978), and by the Federal Trade Commission In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978), Trade Reg. Rep. (CCH) Supp. No. 330, or, as held by the Court of Appeals herein, add nothing specific whatever to the rule of reason?

4. Assuming arguendo that the Fifth Circuit and the Federal Trade Commission were correct in interpreting Sylvania to mean that the specific factors referred to in Sylvania as relevant to a determination of reasonableness or unreasonableness of a vertical territorial restraint under the rule of reason should be focused on by future juries, are petitioners entitled to a new trial under the doctrine that an intervening change in the law governs in pending litigation, as held in Bradley v. Richmond

School Bd., 416 U.S. 696 (1974); Hamling v. United States, 418 U.S. 87 (1974); and United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103?

5. Assuming arguendo that the Supreme Court of the United States in Sylvania did not refer to specific criteria to be considered when future juries test a vertical territorial restraint under the rule of reason and intended to leave factfinders with nothing more than the statement of the rule of reason in Chicago Board of Trade v. United States, 246 U.S. 231 (1918), should the Court acknowledge such resultant formlessness and lack of content of the latter rule and establish some criteria for restricted distribution cases under the rule of reason?

6. Under the rule of Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), which prohibits the doctrine of unclean hands as a defense in a private

antitrust suit, may the defendant nonetheless introduce unclean hands evidence to prove that there are no damages, an important element in the cause of action itself?

7. Under the rule of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), which prohibits the doctrine of in pari delicto as a defense in a private antitrust suit, may the defendant nonetheless introduce in pari delicto evidence on the ground that its motive is to show that a vertical territorial restraint is reasonable under the rule of reason?

8. Where a jury is never asked for actual or compensatory damages, is asked by a counterclaimant for nominal damages only, is instructed by the trial court that the counterclaimant seeks only nominal damages in a specified amount and that it cannot award damages in a greater amount, and then that jury returns a verdict for the precise amount of nominal damages requested, may a

Court of Appeals properly rule that the jury did not return a verdict for nominal damages but one for actual damages in a nominal amount?

9. Assuming arguendo that a Court of Appeals cannot properly convert a verdict for nominal damages into something called a verdict for actual damages in a nominal amount, do the Clayton and Sherman Acts require in a private antitrust action that there must be injury and damages and there can be no recovery unless compensatory or actual damages are proved, and therefore the right to nominal damages does not exist in a private antitrust action?

STATUTORY PROVISIONS INVOLVED

The applicable portions of 15 U.S.C. §§ 1-7 and 12-27 are set forth in Appendix B.

STATEMENT OF THE CASE

Petitioners' causes of action are based on Section 1 of the Sherman Act and Section 4 of the Clayton Act. These causes asserted that Royal Crown imposed and enforced against its dealer First Beverages a vertical territorial restraint of trade which was unreasonable and therefore illegal within the meaning of Section 1 of the Sherman Act. That restraint absolutely prohibited each of Royal Crown's dealers from selling Royal Crown products to persons located outside of the exclusive specifically designated geographical area assigned to each dealer. Specifically, petitioners asserted that Royal Crown terminated syrup and canned soft drink sales to First Beverages, its Las Vegas dealer, in order to prevent First Beverages and other petitioners from fulfilling purchase orders for 800,000 cases of soft drinks from a Los Angeles grocery

chain.

Royal Crown counterclaimed, asserting that its restraint was reasonable under Section 1, that therefore petitioners' sales and shipments of Royal Crown soft drinks from Las Vegas to the Los Angeles grocery chain constituted a conspiracy in restraint of its trade which violated Section 1 of the Sherman Act, and that it was entitled to nominal damages therefor.

Prior to the 1976 trial, petitioners proved in several motions that Royal Crown passed title to its products to First Beverages, and that therefore the restraint was per se unreasonable under United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). However, the district court refused to so hold. Therefore, at trial the petitioners not only asserted that the said per se rule was applicable, but in the alternative also asserted that the restraint was unreasonable under the rule of reason set

forth in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). With respect to the per se unreasonable argument, evidence was admitted that title to Royal Crown's products passed to First Beverages. No evidence to the contrary was offered or admitted. Petitioners also, after unsuccessfully attempting to understand what was the specific content of the rule of reason set forth in Chicago Board of Trade and what was the criteria set forth therein to determine the reasonableness of Royal Crown's vertical territorial restraint,* submitted evidence which they hoped would be relevant to prove that the restraint was unreasonable under Chicago Board of Trade.

In pretrial proceedings and during the trial the district court also made several rulings concerning the meaning of the rule

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* See Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. of Chi. L. Rev. 1 (1977).

of Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), prohibiting the unclean hands defense in an antitrust suit, the meaning of the rule of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), barring the in pari delicto defense in antitrust suits, and the issue of whether a right to nominal damages exists in an antitrust suit.

At the close of the trial, the district court refused to apply Schwinn's passage of title test and instruct the jury that Royal Crown's restraint was per se unreasonable, ruled that it adopted the rule of reason as the governing standard, and gave the following portion of the Chicago Board of Trade rule of reason statement as its jury instruction:

> "In determining whether or not a particular restraint is reasonable or unreasonable, and therefore that it is or is not a violation of the antitrust

laws, you may consider:

First, the nature of the particular industry involved;

Second, facts which are peculiar to the business in which the restraint is applied;

Third, the nature of the restraint and its effect, actual and probable, upon soft drink bottlers and upon consumers;

Fourth, the history of the restraint;

Fifth, the reasons for adopting the practice."

(R.T. 5389-5390).

The jury returned verdicts denying the petitioners' antitrust claims and returned separate verdicts awarding Royal Crown the requested nominal damages against petitioners.

Following the jury verdicts and judgments in favor of Royal Crown, petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit. During the pendency of the appeal,

the Supreme Court of the United States decided Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). That latter decision overruled Schwinn's passage of title test for per se unreasonableness, held that particular applications of vertical restrictions may justify per se prohibition if based upon demonstrable economic effect, and set forth several specific criteria to be applied if a vertical restriction was to be tested under the rule of reason.

The Court of Appeals, as set forth infra, refused to order a new trial based on the intervening changes in the law or errors by the district court, and affirmed the award to Royal Crown of nominal damages. The grounds given by the Court of Appeals for its refusal are set forth in Numbers 1 through 4 of the Reasons For Granting The Writ and in Appendix A.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN CONTINENTAL T.V., INC. V. GTE SYLVANIA, INC., 433 U.S. 36 (1977), AND WITH THE DECISIONS OF THE SEVENTH AND TENTH CIRCUITS IN GENERAL BEVERAGE SALES CO. V. EAST-SIDE WINERY, 568 F.2d 1147 (7th Cir. 1978), AND LAMP LIQUORS, INC. V. COORS CO., 563 F. 2d 425 (10th Cir. 1977), HOLDING THAT, BASED UPON DEMONSTRABLE ECONOMIC EFFECT, PARTICULAR APPLICATIONS OF VERTICAL RESTRICTIONS MAY JUSTIFY PER SE PROHIBITION, AND THAT AN ANTITRUST SUIT PLAINTIFF SHOULD BE AFFORDED AN OPPORTUNITY TO PROVE THAT THE PARTICULAR APPLICATION CHALLENGED JUSTIFIES PER SE TREATMENT.

The Court of Appeals opinion herein recognizes that under United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), Royal Crown's vertical territorial restraint was per se unreasonable, and that at the time of the 1976 trial the district court erred when it ruled otherwise. The Court of Appeals also correctly notes that this particular error has been rendered harmless by the overruling of Schwinn's passage of title test during

the pendency of the appeal by Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). The reason, of course, is that an intervening change in the law must be applied in litigation still pending. United States v. Schooner Peggy, 5 U.S. (1 Cranch.) 103; Bradley v. Richmond School Bd., 416 U.S. 696 (1974); Hamling v. United States, 418 U.S. 87 (1974).

However, having properly applied the Sylvania intervening change in the law in pending litigation to cure the district court's earlier error respecting Schwinn, the Court of Appeals was also bound to apply all of Sylvania. Specifically, Sylvania also required the Court of Appeals to remand petitioners' per se unreasonable claim for a new trial so that they would be afforded an opportunity to prove, as they assert, that under the new standard set out in Sylvania, Royal Crown's restraint is per se unreasonable under Northern Pac. R. Co.

v. United States, 356 U.S. 1 (1958), and Sylvania.

Sylvania overruled the passage of title test in Schwinn as follows:

> "Accordingly, we conclude that the per se rule stated in Schwinn must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. But we do make it clear that departure from the rule of reason standard must be based upon demonstrable economic effect..." 433 U.S. at 57. (Emphasis supplied).

Relying on this language, the Seventh Circuit in General Beverage Sales Co. v. East-Side Winery, 568 F.2d 1147, 1154 (7th Cir. 1978), remanded a case for retrial wherein the defendant had also imposed a vertical restriction upon its dealers by limiting their sales of wines and brandies to

specifically designated geographical areas. The opinion recognized that as a result of Sylvania, the restraint was no longer per se unreasonable under the passage of title test in Schwinn, but went on to rule:

> "On remand, however, plaintiff should be afforded the opportunity to prove that this particular type of vertical restriction justifies per se prohibition 'based upon demonstrable economic effect.' "
>
> 568 F.2d at 1154.

The Tenth Circuit agrees with the Seventh Circuit. In Lamp Liquors, Inc. v. Coors Co., 563 F.2d 425 (10th Cir. 1977), the opinion states:

> "We have noted above that the district court ruled that absent the alleged violation of liquor laws of Wyoming by Lamp Liquors, there would be an antitrust violation. The court was, of course, thinking of a per se

violation based on the vertical restraint of trade practiced by Coors. Since, however, there has been an intervening change of the law in per se violations as a result of the Supreme Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., supra, the district court will be called on to consider, assuming that the plaintiff contends that there is nevertheless a per se violation, whether the alleged vertical restraint which prevents Lamp Liquors from selling to persons for out-of state resale has an effect of such magnitude on competition and lack of redeeming value that a per se illegality rule should apply under GTE Sylvania, Inc., supra; Northern Pacific R. Co. v. U.S., 356 U.S. 1, 5...(1958); and White Motor Co. v. U.S., 372 U.S. 253...(1963)."

563 F.2d at 431-432.

However, despite petitioners' contention that there is nonetheless a per se violation, the Court of Appeals has refused to afford petitioners an opportunity to prove that Royal Crown's restraint, based upon demonstrable economic effects, justifies per se prohibition. Its rationale is that Sylvania "impliedly held that vertical territorial restrictions such as those involved in the case before us must be analyzed under the rule of reason" only.

Sylvania did not so hold. Rather, it explicitly rejected such an interpretation when it stated in overruling Schwinn that it did "not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co." Sylvania, 433 U.S. at 57. This language recognizes not only that the particular application of a vertical restriction which absolutely prohibits intrabrand competition, as does

Royal Crown's, may, based upon demonstrable economic effects, justify per se prohibition, but that even the Sylvania type of vertical restraint which did not foreclose intrabrand competition might justify per se prohibition based upon demonstrable economic effects.

Nor does the Federal Trade Commission agree with the Court of Appeals decision here that Sylvania prohibits a per se analysis of the cola company restraints when based upon demonstrable economic effects. Before ruling that the vertical territorial restraints used by Coca-Cola and Pepsi-Co., which are identical to Royal Crown's, are unreasonable under the rule of reason criteria set forth in Sylvania, the Federal Trade Commission concluded that on the facts before it, the restraint was not per se unreasonable under Sylvania and Northern Pac. The opinion stated that such a decision on the per se issue was necessary because:

"In the aftermath of GTE, Topco-type market division agreements among competitors clearly remain per se illegal (GTE, supra at 71,901 fn. 28), while supplier-imposed vertical territorial restrictions must generally be policed under the rule of reason unless it can be demonstrated that, in a particular situation, they typically have or are likely to have a 'pernicious effect on competition' and that they 'lack ... any redeeming virtue ...' (Id at 71,902).

Under the court's most recent pronouncement, then, the first step in evaluating these restraints is to classify them as horizontal or vertical. ...

2. Vertical Per Se Theories

As we mentioned previously, the Supreme Court, in overruling Schwinn, has not entirely rejected the

possibility that vertical restrictions may, in individual cases, be declared per se unlawful, but it has toughened the standard considerably. Only those restraints found to be 'pernicious' and without 'any redeeming virtue' now justify per se treatment. The types of competitive situations, other than price fixing, which may meet this standard are unclear, but beyond that, the trier of fact and appellate tribunals must be receptive to the fact that situations may exist in which the imposition of a vertical restraint may, under GTE, still be per se unlawful."

In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978) Trade Reg. Rep. (CCH) Supp. No. 330. (Emphasis supplied).

The Court of Appeals decision here clearly is in conflict with the decision

in Sylvania, and for that reason alone should be reviewed. However, assuming arguendo it was not, it certainly is in conflict with the above cited decisions of the Seventh and Tenth Circuits and should be reviewed so that the lower courts will know which of these conflicting views should be applied in vertical territorial restraint cases. The same is true with respect to the Federal Trade Commission decision in the Coca-Cola case. Also, it is clear that this Court's views concerning fair play and due process require that a litigant who successfully carried his burden of proving a restraint per se unreasonable under the law applicable at the time of the trial should be afforded an opportunity to carry the new burden of proof imposed after that trial but while the litigation is still pending. To this date no jury or court has ever ruled on the per se issue under Sylvania.

2. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN SYLVANIA, THE DECISION OF THE FIFTH CIRCUIT IN DOUGHERTY V. CONTINENTAL OIL CO., 579 F.2d 954, 960 (5th Cir. 1978), AND WITH THE OPINION OF THE FEDERAL TRADE COMMISSION IN THE MATTER OF THE COCA-COLA CO., No. 8855 (F.T.C. APRIL 25, 1978) TRADE REG. REP. (CCH) SUPP. No. 330, HOLDING THAT SEVERAL SPECIFIC CRITERIA SHOULD BE FOCUSED ON WHEN THE FACTFINDER DETERMINES REASONABLENESS OR UNREASONABLENESS OF A VERTICAL TERRITORIAL RESTRAINT UNDER THE RULE OF REASON; AND ASSUMING THAT THE SUPREME COURT DID NOT CAST ADDITIONAL LIGHT ON THE CRITERIA TO BE APPLIED UNDER THE RULE OF REASON IN TESTING THE LEGALITY OF RESTRICTIONS ON DISTRIBUTIONS AND SIMPLY REPEATED THE LANGUAGE OF THE RULE OF REASON SET FORTH IN CHICAGO BOARD OF TRADE V. UNITED STATES, 246 U.S. 231 (1918), THE FORMLESSNESS AND LACK OF CONTENT OF SUCH STATEMENT OF THE RULE OF REASON SHOULD BE REMEDIED.

Petitioners submit that aside from its overruling of Schwinn's passage of title test in determining per se unreasonableness of a vertical territorial restraint, Sylvania was important in that it filled part of a troublesome void in restricted

distribution cases under Section 1 of the Sherman Act. Specifically, the opinion gave content to the rule of reason stated in Chicago Board of Trade v. United States, 246 U.S. 231 (1918), by specifying some of the criteria to be focused on in determining whether a vertical restraint was reasonable or unreasonable under the rule of reason. Hence, following Sylvania, the Fifth Circuit and the Federal Trade Commission, the latter in determining that the very restraint involved here was unreasonable under the rule of reason, each required that the attention of the fact-finder be focused on these specific criteria in applying the rule of reason to a vertical restraint. Thus, in Dougherty v. Continental Oil Co., 579 F.2d 954, 960 (5th Cir. 1978), the Fifth Circuit reversed and remanded a vertical territorial restraint case tried prior to Sylvania where a rule of reason analysis contained

in an interrogatory was rendered deficient by Sylvania because the latter:

> "... suggested that future juries evaluating vertical territorial restrictions should consider whether the decrease in intrabrand competition caused by the restriction was offset by an increase in interbrand competition. 433 U.S. at 54, ... The jury's attention was not focused on this critical factor."

And in the Federal Trade Commission's exhaustive analysis prior to concluding that the Coca-Cola and Pepsi-Co. vertical territorial restraints were unreasonable under the rule of reason, the opinion not only reviewed the above referred to specific criterion from Sylvania but several others set forth in Sylvania as criteria in judging restricted distribution cases. In the Matter of the Coca-Cola Co., No. 8855 (F.T.C. April 25, 1978), Trade

Reg. Rep. (CCH) Supp. No. 330. Indeed the Coca-Cola opinion is virtually a blue print of the specific factors which Sylvania thought important to weigh when determining whether a cola company restraint is reasonable or unreasonable under the rule of reason.

In the instant case the jury's attention was not focused on any of these criteria because Sylvania was not handed down until after the trial was completed and appeal proceedings were pending. Hence, under the old rule that intervening changes in the law govern in pending litigation, petitioners are entitled to a new trial so that evidence may be introduced as to these factors and the jury's attention focused thereon by proper instructions. Schooner Peggy, 5 U.S. (1 Cranch.) at 109; Bradley v. Richmond School Board, 416 U.S. 696; Hamling, 418 U.S. at 102.

The Court of Appeals ruled that the

rule of reason instruction given here, drawn from Chicago Board of Trade, was sufficient and that Sylvania does not require the jury's attention to be directed to the specific content assigned to the rule of reason in restricted distribution cases by Sylvania. The Court of Appeals decision is thereby in conflict with the Fifth Circuit's decision in Dougherty and the opinion of the Federal Trade Commission in the Coca-Cola case, and gives strong support to the assertion by Professor Posner that, in restricted distribution cases, Sylvania added nothing to the formlessness and lack of content of Chicago Board of Trade's statement of the rule of reason. Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. of Chi. L. Rev. 1, 14-16 (1977).

Petitioners have already suggested that since the Supreme Court thought that

several additional criteria in determining the reasonableness of a vertical restraint were important enough to overrule a precedent only 10 years old, it should follow that the Supreme Court also thought that future factfinders should receive evidence on those criteria and be instructed as to their relevance.

One writer does not agree. Posner, supra. Professor Posner suggests that Sylvania did nothing to add content to the Rule of Reason in restricted distribution cases. He states that: "The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability." Id at 14. He adds that Chicago Board of Trade's effort to provide content to the Rule of Reason "is not a helpful formulation," and that "to be told to look to the history, circumstances, purposes, and effects of a challenged restriction is not to be provided with usable

criteria of illegality." Id at 15. Finally, Posner states that: "The Rule of Reason in its present state is a poor guide to the decision of restricted distribution" cases, and its "formlessness is clearly conveyed by the American Bar Association's recent monograph on restricted distribution." Id at 16.

Therefore, assuming that Professor Posner and the Court of Appeals for the Ninth Circuit are correct and the Supreme Court did not in Sylvania shed further light on the criteria to be applied under the rule of reason to restricted distribution cases, the need to do so is clear. Plaintiffs, defendants, lawyers, trial judges, juries, and law professors need something more than abstractions devoid of criteria if they are to determine rationally whether a vertical territorial restraint is reasonable or unreasonable under the rule of reason. The need to do so in the instant case

is illustrated by the fact that when the Federal Trade Commission applied the rule of reason, as explained in Sylvania, to the same vertical restraint involved here, it decided the restraint was unreasonable under the rule of reason, but when the jury here was given the Chicago Board of Trade abstractions only, it found the restraint reasonable.

Because trial and intermediate appellate courts should know whether or not the factfinder's attention should be focused on the criteria set forth in Sylvania when determining if a vertical territorial restraint is reasonable under the rule of reason and because the Court of Appeals decision here is in conflict with the opinions of both the Fifth Circuit and the Federal Trade Commission, certiorari should be granted.

3. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN KIEFER-STEWART CO. v. JOSEPH E. SEAGRAM & SONS, 340 U.S. 211, HOLDING THAT UNCLEAN HANDS IS NOT AN ALLOWABLE DEFENSE IN AN ANTITRUST ACTION, AND IN PERMA LIFE MUFFLERS, INC. v. INTERNATIONAL PARTS CORP., 392 U.S. 134, HOLDING THAT THE DOCTRINE OF IN PARI DELICTO IS NOT TO BE RECOGNIZED AS A DEFENSE TO AN ANTITRUST ACTION.

"Unclean hands refers to the plaintiff's wrongdoing against a third party with respect to the subject matter of the suit." Memorex Corp. v. I.B.M. Corp., 555 F.2d 1379 (9th Cir. 1977). Unclean hands is not an allowable defense in an antitrust action. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951). Such rule is "premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever present threat to deter anyone contemplating business behavior in violation of the antitrust laws." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134,

139 (1968). Such defenses have "no place in a treble-damage antitrust action." Id at 148 (concurring opinion of J. Marshall). The reasons for the rule also include "the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes." Id at 138. The Court of Appeals here has not obeyed this rule.

Royal Crown submitted a jury instruction to the effect that petitioners' trucking arrangements for the transfer of Royal Crown soft drinks from Las Vegas to Los Angeles may have violated Interstate Commerce Commission regulations. (R. 1311, 1366). After petitioners moved to strike such defense, Royal Crown argued that such evidence was relevant to "whether there is a legally cognizable cause of action", and was important because:

> "If by legal business activity plaintiffs could not have competed

> in the Los Angeles market, the jury could decide that Royal Crown's territorial franchise system does not unreasonably restrain trade since it does not operate to prohibit competition which would otherwise occur." (R. 1549-1554; R. 1589 at 5-9, 1632 at 9-16). (Emphasis supplied).

Hence, Royal Crown conceded, before the jury ever heard such evidence, that a group of lay persons could be influenced by such evidence to conclude that Royal Crown's restraint was reasonable under the rule of reason, and that petitioners therefore had no cause of action. In addition, Royal Crown argued that such evidence should be admitted to eliminate damages or reduce damages, arguing that the I.C.C. might have stopped such trucking arrangements, that the costs of shipping would thereby increase, that petitioners' profits would thereby be eliminated or reduced, and that damages

would be similarly affected. (R. 1311, 1366; R. 1589 at 5-9, 1632 at 9-16). The courts below ruled that the evidence was admissable on the issue of the amount, if any, of damages. (R. 5396-5397).

Royal Crown then told the jury the trucking arrangements were analogous to hiring child labor at fifty cents an hour, and argued that the damages asserted would be eliminated entirely or reduced as a result of such evidence. (R.T. 3185).

Little imagination is required for a lawyer to think of several reasons why some act constituting unclean hands has occurred and is conceivably related to whether there are damages in an antitrust action. If that is all that is required to nullify Kiefer-Stewart (unclean hands), as the Court of Appeals ruled here, then the intellectual investment committed to that case was not worth the effort. If Kiefer-Stewart is that empty of content, it should be overruled so

that prospective antitrust litigants can make realistic judgments about the merits of a particular case. But if Kiefer-Stewart means what it says, the Courts of Appeals ought to be required to follow it.

Furthermore, damages go to the extent of the antitrust injury, an important element in the cause of action itself. Therefore, use of unclean hands or illegality evidence to eliminate or reduce damages is equivalent to its use as an affirmative defense.

Thus, the Court of Appeals' decision sustaining the use of unclean hands evidence here, on the ground that it was not used as a "complete affirmative defense," defeats the substance and spirit of Kiefer-Stewart. To rule that evidence of unclean hands is admissable to prove there are no damages hardly squares with the view that such defense has "no place in a treble damage antitrust action." Perma Life, 392 U.S. at 148.

Royal Crown, similarly succeeded in reducing to the consistency of tapioca pudding the Supreme Court's ban on in pari delicto in antitrust suits. Perma Life, 392 U.S. at 140, held that "the doctrine of in pari delicto, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."

The Court of Appeals acknowledged here that Royal Crown asserted such in pari delicto defense in its Pretrial Memorandum, argued in defense thereof that Perma Life did not bar such defense based on petitioners' "truly complete involvement and participation" in Royal Crown's vertical territorial restriction, resisted petitioners' motions to strike the defense, introduced evidence to show that petitioners First Beverages and Will Norton were involved and participated in such restriction, and argued to the jury respecting such evidence. Nonetheless, it

held that Royal Crown did not make an in pari delicto defense because Royal Crown's "purpose" in offering such evidence was to show thereby that the vertical restraint was reasonable under the rule of reason.

Thus, the Court of Appeals has ruled that Perma Life's prohibition of in pari delicto does not matter if the "purpose" of an antitrust defendant in offering the evidence of participation and involvement is to challenge the heart of plaintiff's cause of action, i.e. that the disputed vertical restriction is unreasonable under the rule of reason. If so, then Perma Life is easier to kill than Kiefer-Stewart.

Surely it is plain that both the rule and the intent of Perma Life are not being complied with when a Court of Appeals so reasons.

The decision of the Court of Appeals is in conflict with Kiefer-Stewart and Perma Life.

4. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SEVENTH AND EIGHTH CIRCUITS IN TURNER GLASS CORPORATION v. HARTFORD-EMPIRE CO., 173 F.2d 49 (7th Cir. 1949) AND AMERICAN CAN CO. v. RUSSELLVILLE CANNING CO., 191 F.2d 38 (8th Cir. 1951), HOLDING THAT THE RIGHT TO NOMINAL DAMAGES IN AN ANTITRUST SUIT DOES NOT EXIST.

Under Section 4 of the Clayton Act and Section 1 of the Sherman Act, Royal Crown counterclaimed against each petitioner asserting that its vertical restraint was reasonable under the rule of reason and that therefore it was a violation of Section 1 of the Sherman Act for petitioners to conspire to disrupt the Los Angeles and Las Vegas franchise arrangements by selling and shipping Royal Crown soft drinks into the Southern California area.

However, at the trial, after failing to even mention its antitrust counterclaims to the jury in its opening statement (R.T. 74-86), Royal Crown explicitly told the jury, the petitioners and the district court

that it sought only nominal damages of $500 against each petitioner for its asserted antitrust claim.* The district court instructed the jury that Royal Crown "seeks only nominal damages for $500 from the plaintiffs," and "you may not award a greater amount." (R.T. 5400). Subsequently, the jury returned the requested verdicts of $500 against each petitioner on the antitrust counterclaim. Later, the district court awarded Royal Crown $10,000 in attorney's fees for the recovery of the nominal damages of $500. (C.R. 1881-1883, 1970-1973).

Thus, the jury was never asked to return a verdict of actual damages, was asked for nominal damages only, was instructed by the district court that it was forbidden to return a verdict other than for the

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* "We are only asking for nominal damages just to emphasize the point, and his Honor will instruct you that is the maximum that can be awarded."
Royal Crown's closing statement to the jury. (Emphasis supplied) (R.T. 5328-5329).

nominal damages sought, and subsequently returned verdicts for the precise amount of nominal damages sought.

Nominal damages are given not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right; they are not the same as damages small in amount. Danker v. Iowa Power & Light Co., 249 Iowa 327, 86 N.W. 2d 835, 847; Hysinger v. Mullinax, 204 Tenn. 181, 319 S.W. 2d 79, 82; McCormick on Damages §21 (1935). Such damages are in contradistinction to actual or compensatory damages. Price v. McComish, 22 C.A. 2d 92, 70 P.2d 978, 982. Nominal damages are damages which exist in name only, and not in fact or in amount; they are the same as no damages at all. Fairfield v. American Photocopy Equipment Co., 138 C.A. 2d 82, 291 P.2d 194, 198; Price; McGrew Mach. Co. v. One Spring Alarm Clock Co., 124 Neb. 93, 245 N.W. 263, 266.

Since, under Section 4 of the Clayton Act, "without actual damages to plaintiff, there can be no recovery," Turner Glass Corporation v. Hartford-Empire Co., 173 F.2d 49, 52 (7th Cir. 1949) and there cannot be recovery unless compensatory damages are awarded, American Can Co. v. Russellville Canning Co., 191 F.2d 38, 54 (8th Cir. 1951), the right to nominal damages in an antitrust suit does not exist. Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, 449 (ED Pa. 1960).

Hence, the decision of the Court of Appeals herein, affirming the award of nominal damages in an antitrust suit and the allowance of $10,000 in attorney's fees for recovery thereof, conflicts with the above decisions of the Seventh and Eight Circuits.

Nor can the rationale of the Court of Appeals' opinion here avoid the foregoing conflicts among the Circuits. That rationale

itself is in conflict with principles enunciated by the Supreme Court. The opinion states that because the district court also instructed the jury that Royal Crown must show that the antitrust violation proximately caused some actual injury to its business or property, the district court really instructed the jury that it could only return a verdict for actual damages in a nominal amount, and that the jury must be presumed to have followed this latter instruction.

Aside from the Orwellian cloud accompanying such a process of reasoning, (white is really black and nominal is really actual), and that it ignores completely the fact that Royal Crown noticed the opposing parties in this litigation that it sought only nominal damages, it is in conflict with both the record here and principles enunciated by the Supreme Court.

First, since the jury is presumed to

have followed the instruction to it, and it was instructed that Royal Crown "seeks only nominal damages of $500 from the plaintiffs" and "you may not award a greater amount," it follows that the jury could not have returned actual damages of $500.

Next, the said reasoning assumes that a finding that there is actual injury encompasses a finding that there are actual damages. Yet Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488-489, makes clear that there must be injury and damage within the meaning of Section 4 of the Clayton Act. Part of a plaintiff's burden of proof is to show monetary damages which have been actually sustained. Therefore, a finding that an antitrust violation proximately caused actual injury to business or property does not include a finding that such injury resulted in monetary damages. Thus, it cannot be reasoned that an instruction to a jury that Royal

Crown is required to show that an anti-trust violation proximately caused actual injury to its business or property means that the jury must have determined that actual monetary damages resulted therefrom, especially when the jury was also instructed that Royal Crown "seeks only nominal damages of $500" and "you may not award a greater amount."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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(APPENDIX A AND B IN SEPARATE VOLUME)